No. 14,197

IN THE

United States Court of Appeals

For the Ninth Circuit

W. O. BEDAL,
Appellant,

vs.

THE HALLACK AND HOWARD LUMBER COMPANY, a corporation,
Appellee;

and

W. O. BEDAL,
Appellant,

vs.

OREGON SHORT LINE RAILROAD COMPANY, a corporation, and UNION PACIFIC RAILROAD COMPANY, a corporation,
Appellees.

Appeals from the United States District Court for the District of Idaho.

REPLY BRIEF FOR APPELLANT.

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SUMMARY OF ARGUMENT.

A. There is no evidence presented in either the Powell case or in the cases appealed from that creates an inference that Bedal was negligent.

B. Assuming Bedal was bound by the facts adjudicated in the Powell case, the question of whether Bedal was or was not negligent was not adjudicated by the court and jury.

1. Bedal cannot be bound to any set of facts not adjudicated in the Powell case.

C. Bedal was never asked to defend the Powell case by the railroads nor given notice to defend by them and, therefore, could not be bound by any set of facts that might have been found to exist by the trial court.

1. The lumber company could not bind Bedal to any finding that might have been made in the Powell case, because it was a stranger to that lawsuit and could not make and did not make a proper tender of defense nor afford Bedal an opportunity to participate in that litigation.

D. Since there was no evidence of Bedal's negligence in either of the two trials, Bedal is entitled to a directed verdict.

E. The railroads were found guilty of negligence and since they acquiesced in the manner in which the logs were unloaded and still allowed their employees to be near the unloading site, they are primary tort feasors.

1. A joint-tort feasor is not entitled to indemnity and the lumber company stands in the railroads' shoes as a subrogee.

F. The issue of Bedal's negligence, if any; Powell's contributory negligence; which negligence was primary or secondary, and whether the railroad acquiesced in a dangerous condition or not were questions that Bedal was entitled to have passed upon by a jury.

G. The logging contract entered into by Bedal and the lumber company can in no sense be construed as an indemnity agreement.

ARGUMENT.

A. THERE IS NO EVIDENCE IN EITHER THE POWELL CASE OR IN THE CASES APPEALED FROM THAT INDICATES BEDAL WAS NEGLIGENT.

We sincerely urge that an examination of the transcript in this case, together with an examination of the transcript in the Powell case, will disclose no evidence from which an inference can be drawn that Bedal was negligent. For the purposes of this argument, we are assuming that Bedal is bound by any facts that may have been litigated in the Powell case and bound by any inference that may be gleaned from those facts. We argue later that Bedal is not bound by the adjudication of the trial jury in the earlier case.

The court should note that in the appellees' brief repeated assertions are made that Bedal was the ultimate wrongdoer; that Bedal was negligent; and that his negligence was adjudicated to be active negligence. The Hallack and Howard Lumber Company is con-

stantly referred to as an innocent party. In fact, of course, the Hallack and Howard Lumber Company by an express contract arrangement agreed to indemnify the railroad against its own—the railroad's—negligence. Is the lumber company then indeed an innocent party? The fact of the matter is that in this lawsuit it is Bedal that has been and is the innocent party caught in the web of circumstances. While these references are being made in appellees' brief to Bedal's negligence, there is seldom any examination of the record or the transcript. The reason appellees do not examine the state of facts shown in either the Powell case or in the cases appealed from is that such an examination discloses no negligence. It is simple enough to allege and reallege throughout an entire brief that the appellant is negligent, but it is another thing to prove it.

The undisputed evidence in the Powell case shows that Powell was hit by a slab from a log which broke off as logs were being unloaded from Bedal's logging truck in the customary and usual manner. (R. 232.) The logs had been pushed down the same 20-foot incline for years prior to the accident. The slab itself came from an unseen splinter in a log. The evidence also indicates, and this is not disputed, that Powell was not watching the unloading operations at the time the accident occurred. Each witness that testified stated unequivocally when he was so asked that the logs were being unloaded in the usual way and there was nothing unusual in any of Bedal's operations. As

a matter of fact, Powell was standing off the leased premises at the time he was hit by the slab and was sitting on the railroad right of way. There is no evidence that Bedal had any control over Powell's movements, or could tell Powell where to be, or any evidence that Powell was known to be where he was by any of Bedal's employees who were in the process of unloading the logs from the truck. Nowhere in the record in any of the cases is there any evidence of negligence or lack of ordinary care. There is no evidence that the splinter was clearly visible and should have been seen by Bedal or his employees. In fact, as it is pointed out on page 59 of appellees' brief, the splinter was probably "unseen". (See R. 206.) There is no evidence that Bedal would expect this slab to fly off the log. The evidence shows and this is agreed to by the appellees in their brief that such a slab had never fallen off any log before to the knowledge of any employees present or to the witnesses testifying.

How different the facts are in this case from the facts showing negligence in the cases cited by appellees on page 36 of their brief et seq. While we will discuss this question of implied indemnity later on, suffice it to say at this point that in each of the cases in which the courts have applied the principle of indemnity over, the person ultimately responsible is one who without doubt has been negligent and his negligence was the primary cause of an accident or injury. In *United States v. Rothchild International Stevedoring Co.* (1950), 183 Fed.2d 181, cited in appellees' brief

on page 37, the Stevedoring Co. was responsible for the accident because it was operating a winch that had defective brakes. In fact, the evidence disclosed that the brakes had slipped approximately twelve times before the accident in which the original plaintiff was injured. In *Burris v. American Chicle Co.,* 120 Fed. 2d 218, cited on pages 63 and 64 of appellees' brief, the party against whom indemnity was sought was responsible for placing an employee on a scaffold suspended in the air and held up by ropes, one of which was clearly defective. In *Read v. United States,* 201 Fed.2d 758, the third party defendant was held liable because it failed to provide adequate light. (See page 54 of appellees' brief.) In the case of *Westchester Lighting Co. v. Westchester County, etc. Co.* (N.Y.), 15 N.E. 2d 567, the Court properly held that the employer who caused a gas pipe to be negligently broken and enclosed was primarily responsible. Furthermore, in *Alaska Pac. S.S. Co. v. Sperry Flour Co.,* 182 Pac. 634, cited on page 46 of appellees' brief, the party against whom indemnity was sought was probably responsible for a defective plank that was attached between the shore and a boat at dock. We state it was "probably" a defective plank because in that case the Washington Supreme Court reversed the decision of the lower court and ordered that a new trial be held. The basis for the new trial was, as pointed out on pages 636 and 637 of the Pacific Reports, that the appellant was entitled to have the jury determine whether or not the plaintiff steamship company had acquiesced in the dangerous condition cre-

ated by the plank and was precluded from recovery over.

In each of the cases cited by the appellees on page 36 of their brief et seq. there is clear evidence that the party ultimately responsible was guilty of active negligence. What a contrast there is to the factual situation now in front of this court. Nowhere can there be gleaned even an inference of negligence against Bedal.

On page 56 of appellees' brief, there is a feeble attempt to show that there was evidence in the case sufficient to indicate that Bedal was negligent. In looking into the record and trying to find such evidence the appellees depart from what the trial court originally indicated may have been Bedal's negligence. In the Powell case, the court, in denying the railroads' motion for a judgment notwithstanding the verdict (R. 136-140), stated among other things in substance that whether the operation of driving the truck to the top of the steep embankment, pushing the logs from the truck to the top of the steep embankment, and allowing them to descend this steep incline to the track was negligence was a question for the jury. In this statement, of course, the trial court was wrong. There is no evidence that allowing logs to descend a steep bank was negligence. The only thing submitted to the jury was whether, considering the fact that logs did go down an incline, the railroad nevertheless did not provide sufficient protection to its own employee Powell who was sitting on the railroads' premises.

That this statement of the court cannot be relied upon is clearly shown by appellees' own argument, where on page 59 of their brief they feel that the negligence of Bedal must have been that it knew there was a splintered log and, therefore, it should not have allowed this splintered log to go down this steep bank. (See page 60 of appellees' brief.) Of course, there is no evidence whatsoever that Bedal or his employees knew that there was a splinter in the log or that they should have known that. There is no evidence as to how the logs were cut or felled in the forest or what Bedal or his employees could have done that they did not do. The only positive evidence on this point is that the splinter was probably "unseen" in the log. How could Bedal or his employees have protected anybody or anyone from an "unseen" splinter? Undoubtedly, the speculation that each of the witnesses entered into concerning where the slab came from is correct, and that is that the slab came from an unseen splinter. Is this fact, standing alone, sufficient in itself to establish a case of negligence? Appellant fervently urges the court that the mere fact of an accident is not evidence that Bedal was negligent. Therefore, we sincerely urge the court to reverse the decision of the lower court and direct a verdict in favor of Bedal.

B. THE QUESTION OF WHETHER BEDAL WAS OR WAS NOT NEGLIGENT WAS NOT SUBMITTED TO THE JURY IN THE POWELL CASE.

The appellees have stated several times that the jury found in the Powell case that Bedal was negligent. On page 58 of their brief the appellees speculate upon what basis the Powell verdict could have been sustained. They argue that the railroads were in no way negligent and, therefore, the only possible basis for the court to sustain the verdict was to find that Bedal was negligent. In one respect, of course, we will have to agree with counsel for the lumber company. The evidence in the whole case hardly sustains an inference that even the railroads were negligent. Nevertheless, the jury found for the plaintiff and the trial court did everything it could to sustain the verdict for the plaintiff Powell. In reading over the appellees' brief, one must reach the inescapable conclusion that appellees cannot satisfy themselves as to how or why Powell recovered a verdict on the basis of negligence.

In appellant's opening brief much time was spent in discussing the case of *Booth-Kelly Lumber Co. v. Southern Pacific Co.,* 183 Fed.2d 902, 20 A.L.R. 2d 695. In fact, appellant devoted his whole Appendix to a discussion of this case. We feel that this case is vital, since it discusses many principles involved here. Furthermore, appellant feels that if the court follows its own decision, it must find in favor of Bedal.

Appellees have made no effort to deny any of the arguments appellant has made concerning the *Booth-*

Kelly case. In the original litigation leading up to the *Booth-Kelly* case, an employee of the Southern Pacific Railroad Co. successfully sued the railroad. Later, the railroad sued the Booth-Kelly Lumber Company on the basis of implied indemnity and express contract indemnity. The lumber company urged that the negligence of the railroad was found in the first litigation to be the primary cause of the accident. The Court of Appeals in the former decision pointed out, however, that the sole question presented by the first litigation was whether or not the railroad was negligent. The Circuit Court stated there was no finding in the former case that the lumber company was negligent or whose negligence was primary and secondary. The court specifically pointed out that the first litigation was only determinative of the fact that the employee Powers was injured, the extent of the judgment, and that a contributing proximate cause of the employee's injury was the negligent failure of the Southern Pacific Co. to furnish him a safe place to work.

In this case, the lumber company is urging that in the Powell case Bedal's negligence was adjudicated. How can this be? The only party defendant in the Powell case was the railroad. Fortunately, we have before us the instructions of the trial court to the jury in the Powell case. (Exhibit 7.) The instructions to the jury are found on pages 182 through page 203 of exhibit 7. Nowhere in any of these instructions is Bedal's name mentioned. The court does not instruct the jury on any phase of the unloading operation. The only person against whom the court was instructing

was the railroad. On pages 186 and 187 of exhibit 7 the court tells the jury that the railroad is under a duty to furnish its employees with a reasonably safe place to work. Again, on page 188, the court tells the jury that the contributory negligence of Powell was no defense. The court reiterates on pages 202 and 203 of its instructions that in order to find against the railroads, the jury must find that the railroads were negligent and that such negligence was "in whole or in part the cause of plaintiff's injury." What basis is there then for appellees' assertion that the jury found Bedal was negligent? This case cannot be distinguished on this particular point from the *Booth-Kelly* case. Undoubtedly, in the *Booth-Kelly* case the trial court instructed the jury in a similar manner to the way the trial court in this case instructed the jury. The Court of Appeals for the Ninth Circuit correctly held that the question of the lumber company's negligence in the *Booth-Kelly* case was not an issue in the lawsuit between the employee and the Southern Pacific Railroad Co.

The appellees hopefully rely on the case of *Waylander-Peterson Co. v. Great Northern Ry. Co.,* 201 Fed. 2d 409, discussed in appellees' brief beginning on page 62. In the *Waylander* case the railroad was sued by an employee who was struck by a piece of timber that fell from a bridge being constructed by the Waylander-Peterson Co. Waylander-Peterson was brought in as a third party defendant and participated in the trial of the case. At the trial a contract was

introduced which provided that Waylander was to build a bridge over the railroad. A provision in it stated in substance that the contractor was forbidden from allowing material to fall off the bridge that might hit workmen on the trains. A timber did fall off the bridge at a time when there was no wind and hit the employee, who sued the latter under the Federal Employers' Liability Act, 45 U.S.C.A. Sec. 51 et seq. At the trial the court submitted special interrogatories to the jury asking (a) if a piece of timber fell from the bridge and hit the employee and (b) whether or not the negligence of the contractor was the primary cause of the accident. The jury answered both questions in the affirmative. In addition, the court specifically instructed the jury upon the doctrine of *res ipsa loquitur*. It was upon this basis that the jury found the contractor negligent. In addition, the evidence submitted in the case showed, according to the remarks of the trial judge on page 416, repeated instances of timber and debris falling from the bridge.

Thus it can be seen that in the *Waylander* case the proposed third party indemnitor, a party to the original action, was bound by the jury's adjudication of its own negligence because the jury was specifically instructed to find whether or not the third party was negligent and whether its negligence was the primary cause of the accident. In this case, the judge did not instruct the jury in the Powell case on the theory of *res ipsa loquitur*. Nor could he have done so, for it

would not have been proper. In a logging operation, such as this, debris would customarily fly off logs as they were being unloaded and the accident itself was *not* such as in the ordinary course of things would not happen, except by the failure to exercise ordinary care. In addition, witness after witness testified who saw the accident happen. Furthermore, there was no reason in the Powell case for anyone to submit evidence as to how the logs were felled in the forest because that was not in issue and would not have been proper. The appellees do not suggest that the doctrine of *res ipsa loquitur* could uphold their judgment here because they knew the question was not submitted to the jury in the Powell case.

Thus, if Bedal is bound by what was found by the jury in the Powell case, these findings could in no way prejudice his case. When the lumber company sued on the theory of implied indemnity and relies on a former judgment as *res adjudicata,* it can only rely on that former judgment to the extent that facts were actually adjudicated therein. Bedal's negligence was not adjudicated in the Powell case. At the very least, Bedal is entitled to a jury trial. The lumber company has stated several times in its brief that Bedal cannot once again gamble on a jury. Bedal has never had a chance to even honestly present his case to a jury in the first instance. The only party that is afraid to have the case submitted to a jury is the lumber company, for the lumber company realizes that there is little gamble in it. It is so clear that

Bedal was not negligent that the jury would take very little time in bringing in a verdict for Bedal.

C. BEDAL IS ENTITLED TO HAVE EVERY SINGLE FACT ADJUDICATED IN THE POWELL CASE RELITIGATED AND SUBMITTED TO A JURY, INCLUDING THE RAILROADS' NEGLIGENCE IN THE FIRST INSTANCE AND THE ISSUE OF POWELL'S CONTRIBUTORY NEGLIGENCE.

The appellees have cited a host of cases quoting the general principles regarding the law of indemnity and implied indemnity. Appellant fully recognizes that the doctrine of implied indemnity is well established. The Court of Appeals for the Ninth Circuit in *Booth-Kelly Lumber Co. v. Southern Pacific Co.,* supra, has definitely examined the principle of implied indemnity. As we pointed out in our argument beginning on page 35 of our opening brief, a prior judgment and all of the facts necessarily adjudicated therein can only bind Bedal if Bedal was given notice, a tender of the defense, and an opportunity to defend the Powell case by the actual party defendant —the railroads—that participated in it. It will not be necessary to repeat the argument we made in our brief on this point, but we would like to clear up certain inferences made by the appellees in their brief.

The appellees have not cited a single case in which a third party has been bound by a former judgment where that party was not given notice and an opportunity to defend by one of the original litigants in the action. The court will recall that the railroads were

the only parties defendant in the original case. The lumber company had nothing to do with it. It was a stranger to the action. The railroads did not give Bedal notice nor afford him an opportunity to defend that suit. Only the railroads could bind Bedal to that suit. A stranger could not. But here, the lumber company says that its letter, Exhibit "F", was a tender of the defense of the Powell case. What may we ask did the lumber company have to tender? It had no control over the litigation and had no right to demand that anyone defend it. Consequently, Bedal had no duty to do so. We repeat that the appellees have not cited a single case in which a stranger to the judgment can bind another stranger to a judgment when neither of them were parties. We submit further that there is no such case in Anglo-American jurisprudence. The Restatement of the Law of Judgments, Section 107, contemplates that an indemnitor can only be bound by the former judgment where the indemnitee was a party to the prior action and gave sufficient notice and an opportunity to defend. Since Bedal had no duty to defend that case, he could not be bound by anything in it anymore than the alleged indemnitor could be bound in the case of *Crawford v. Pope & Talbot, et al.,* 206 Fed.2d 784 (1953).

The appellees on page 56 of their brief accused the appellant of sophistry. These words could more aptly be applied to the argument of the appellees beginning on page 69 of their brief in which they indicate no notice or opportunity to defend need be given

since Bedal admitted in his answer that he "failed and refused" to defend the Powell case. On page 3 of appellant's brief, paragraph X of the lumber company's complaint is set out in full. (Also see R. 61, 62 and 63.) Paragraph X was added to the lumber company's complaint by its own amendment. It is true that the lumber company notified Bedal of Powell's claim and of Powell's lawsuit against the railroads. It is true, also, that Powell received the letter attached to the complaint marked as Exhibit "F". This letter clearly was not a tender of the defense. Exhibit "F" should be contrasted with Exhibit "E", which is a proper tender of defense. Exhibit "E" was the letter sent to Bedal by the lumber company when the railroads sued the lumber company, which was almost a year and a half after the Powell case was tried.

Of course, the lumber company realized then, as it realizes now, that it had nothing to tender. Under these circumstances, Bedal admitted that he failed and refused to defend the first lawsuit. But there is no allegation in the complaint that Bedal failed and refused to defend the first lawsuit after the *railroads* gave notice and demanded that Bedal participate in the case. This was never done. This kind of an allegation would be essential to bind Bedal to the results of the first case.

The appellees have hopefully taken the words "failed and refused" to mean that Bedal categorically refused to defend the Powell case. This, of course, is

distorting the plain meaning of a common legal phrase. The words "failed and refused" mean little more in pleading than that Bedal neglected or failed to defend the first case. The admission by Bedal was intended to mean only that and could only mean that. The appellees have taken the word "refused" out of the context of paragraph X of their complaint and tried to build their case around it. On page 69 of their brief they point out that a tender is not required where an express, categorical refusal is manifested in advance. This, of course, is true. But here the lumber company set out its tender and alleges that it is a tender. The letter Exhibit "F", clearly tenders nothing. Furthermore, there is no specific allegation that Bedal refused to defend the lawsuits at any particular time or place, and that this refusal was manifested to the lumber company. The words "failed and refused" simply mean that Bedal failed to defend the Powell case. This Bedal admits. The question of what the words "failed and refused" mean were taken up by the Sixth Circuit in *Mackey v. United States,* 290 F. 18, 21. In that case the court was construing a charge in an indictment for embezzlement which provided in part that the defendant" failed and refused to remit funds in his possession on the 11th day of December, 1919, to the designated depository; * * *." The court, in examining the words "failed and refused" stated:

> " 'to refuse' does not necessarily imply a precedent demand, deliberately denied. 'To fail and refuse' is a common legal phrase, implying only that conventional refusal which is inherent in

> mere failure. In the face of this common meaning of the word, an allegation in an indictment that defendant 'failed and refused' should not be expanded to carry the implication that there was a deliberate intention and inexcusable refusal to comply with the statute either with or without demand therefor."

There can be no difference in the way the words "failed and refused" were used in the case just quoted and the way they were used in the lumber company's complaint. Actually, even if Bedal did refuse actively and consciously to defend the case after a tender, or before a tender by the lumber company, this would still be irrelevant. Only overt action by the *railroad* could have bound Bedal to the prior judgment.

Of course, because Bedal is making this argument, which we seriously urge, Bedal does not feel that even if he were bound by the prior adjudication that there was any evidence of Bedal's negligence, nor was the question of his negligence presented to the jury in the Powell case. Bedall is making this additional argument because he feels that the issue of the railroads' negligence must, as against Bedal, be once again litigated by a jury as well as the question of Powell's contributory negligence.

D. SINCE THERE IS NO EVIDENCE OF BEDAL'S NEGLIGENCE IN THE RECORD, HE IS ENTITLED TO A DIRECTED VERDICT, AND IN ANY EVENT, BEDAL IS ENTITLED TO HAVE THE ISSUES OF HIS NEGLIGENCE, THE RAILROADS' NEGLIGENCE, POWELL'S CONTRIBUTORY NEGLIGENCE AND WHETHER OR NOT BEDAL WAS THE PRIMARY WRONGDOER SUBMITTED TO A JURY.

A logging operation by its very nature entails certain risks. But the mere fact that an operation is risky, such as unloading logs, or felling trees in the forest, does not mean that it is negligent when it is being done in the customary and usual manner. Whether the railroad, knowing what it did about the unloading operation, was negligent in failing to provide Powell with a safe place to work, and whether or not it acquiesced in the condition as it then existed, was a question for the jury. Restatement of the Law of Restitution, Section 95. The trial court failed to submit this question to the jury and Bedal submits that it was error.

The lumber company admits in its brief that the only reason it was held liable to the railroads was because of its contract to indemnify the railroads against the railroads' own negligence. The court so construed the contract. Of course, the lumber company in its suit against Bedal must stand in the railroad's shoes as its subrogee. If the railroad was negligent and the railroad's negligence was the primary cause of the injury to Powell, and not any negligence of Powell's, the lumber company is precluded from any action over. The lumber company does not deny this principle of law and fails to distinguish the case

of *Massachusetts Bonding & Insurance Co. v. Dingle-Clark Co.,* 52 N.E.2d 340. In that case an insurance company was held to stand in the shoes of the assured in asserting a right over against a third party.

Not only does the lumber company contend that Bedal has been adjudged negligent in the Powell case, but it contends that it has also been adjudged that Bedal's negligence was the primary cause of Powell's injury. In considering the question of implied indemnity, the courts distinguish between passive and active negligence. It presents a jury question in each case, as to whether or not prior adjudicated negligence is active or passive. This was held to be so in *Booth-Kelly Lumber Co. v. Southern Pacific Co.,* supra. The appellees do not discuss this question at any length because it is clear that the trial court erred in failing to submit that question to the jury.

Bedal has never had an opportunity to have the question of Powell's contributory negligence submitted to a jury. Though this defense is denied the railroads under the Federal Employer's Liability Act, it is available to Bedal. Powell's contributory negligence has not been litigated even against the railroads. Since Bedal was not a party to the Powell case and not noticed in to defend that case by the railroads, he has a right to have this issue passed on by a jury. These facts distinguish this case from those cited on pages 43-46 of appellees' brief, in which a few courts have held that a valid defense is not available to a party that is properly noticed in as a third party defendant.

Thus, Bedal contends that in each one of these instances the trial court committed reversible error and denied Bedal his constitutionally guaranteed right of a jury trial. Certainly, from the evidence presented in both the Powell case and in the cases from which this appeal is taken, there is ample evidence from which a jury could conclude that Bedal was not negligent and that the sole, proximate cause of the accident was the negligence of the railroads or the contributory negligence of Powell.

E. THE LOGGING CONTRACT ENTERED INTO BETWEEN BEDAL AND THE LUMBER COMPANY IS NOT AN INDEMNITY AGREEMENT.

Appellant feels that he had discussed the question of whether or not the logging contract is an indemnity agreement at sufficient length in his original brief. See pages 73 et seq. The appellees have construed a paragraph from the contract which is clearly intended to show that the logging agreement was made with an independent contractor to mean that Bedal agrees to indemnify the lumber company against its *contractual* obligation with a third party—the railroad. In our opinion, Bedal has failed to properly distinguish our cases, particularly in view of the fact that it stands in the same shoes as the railroad. The railroad was adjudged negligent in the Powell case. As its subrogee and since it was liable to the railroad, it cannot now claim that it stands in a better position than the railroads. For example, on page 31 of their brief the ap-

pellees state that under no theory can the lumber company be charged with negligence. This does not properly distinguish the cases discussed by them on pages 31-33 of their brief.

How the appellees are able to distort plain language to arrive at a meaning favorable to them is amply illustrated in their vain attempts to define the word "incur". If incur means—as they say it does—"cast upon" or "incur liability", then indeed they are arriving at a strange conclusion. Had Bedal "incurred" any claim? Have any claims been cast upon him? As the lumber company admits, the single solitary reason that it was liable to the railroads was because of its contractual agreement with them. If it were the intention of the lumber company to make Bedal liable because of the railroads' contract with the lumber company, it could have done so by including such a provision in the logging contract. It did not.

The lumber company has cited a number of general principles in its brief concerning the construction of contracts. No one can disagree with these general principles of law. The court should note, though, that the lumber company does not cite a single case in which similar language has been used in a contract and a court has arrived at the result that the lumber company desires here. The Tenth Circuit Court of Appeals in *Sinclair Prairie Oil Co. v. Thornley,* 127 F.2d 128, expressly held that an agreement to carry liability insurance was not an agreement to indemnify.

Appellant feels that the lumber company must realize its awkward position here, particularly in view of the words it quotes from *Caldwell State Bank v. First National Bank,* 49 Ida. 110, 286 Pac. 360. On page 24 of its brief the lumber company quotes from the case a statement of the Idaho court in which it says that the actual meaning should prevail over dry words of an instrument "inapt expressions, and careless recitals therein, unless the intention runs counter to the plain sense of the binding words of the agreement." Appellant will agree that if the words "claim and incur", common ordinary words, can have the distorted meaning that the lumber company contends, then indeed it must constitute an inapt expression. It is only now that counsel for the lumber company seriously contend that this contract is a contract of indemnity. In its argument to the trial court below, in support of its motion for a directed verdict, counsel did not mention the logging contract as being one of indemnity. (R. 245, 247.) Appellant feels that it is so apparent that the trial court committed error in failing to allow Bedal's case to go to the jury and, in fact, failing to grant Bedal a directed verdict, that it is the lumber company's sole hope that it may win this case on appeal by virtue of its contractual arrangement with Bedal.

The lumber company argues on pages 26 and 27 of its brief that it is natural for the lumber company to have indemnified itself by reason of its contract with the railroads. We might argue that it is not natural,

but we don't think it is important. The fact remains that the lumber company did not put such a provision in its contract.

Next, the lumber company wishes to construe the word "claim" to mean a "contract claim". If this was the case, the agreement in question would read "that under no circumstances or conditions was the lumber company to become liable for any contract claim whatsoever which may be incurred by Bedal." Still, we insist that no contract claims have been cast upon Bedal or incurred by him. It is obvious that this paragraph was put in the contract between Bedal and the lumber company to make it clear to the world that Bedal was an independent contractor and not a servant or agent of the lumber company. The words contain no promise of indemnity. Also, appellant would like to point out that the logging contract was primarily concerned with the arrangements between the parties to cut, haul and skid logs and then ultimately to unload them at Banks, Idaho. Appellees failed to cite a single case which supports their position that the paragraph they construe in the contract results in a promise by Bedal to indemnify the lumber company. A case to support appellees is particularly difficult to find when they seek indemnity from Bedal as a result of an unfortunate provision in their contract with the railroads.

CONCLUSION.

The appellant respectfully submits that the action of the trial court in directing a verdict in favor of the lumber company should be reversed, and the trial court should be directed to enter a verdict in favor of Bedal. In the alternative, Bedal respectfully submits that the directed verdict of the trial court below in favor of the lumber company should be reversed and the question of Bedal's negligence, the question of Powell's contributory negligence, the question of whose negligence is primary or secondary, and the question of whether or not the railroads were a joint-tort feasor, be submitted to a jury.

Dated, Boise, Idaho,
June 21, 1954.

Respectfully submitted,
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